Supreme Court, U.S.
FILED
JAN 19 1995
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No. 94-1085

IN THE

Supreme Court of the United States

October Term, 1994

BEVERLY LESNICK, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF STANLEY S. LESNICK,
Petitioner,

v.

HOLLINGSWORTH & VOSE COMPANY,
Defendant-Respondent.

and

LORILLARD, INC.,
Defendant.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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22 pp

QUESTION PRESENTED

Whether the court of appeals properly affirmed the district court's dismissal of Hollingsworth & Vose Company for lack of personal jurisdiction where 1) Hollingsworth & Vose was a supplier to Lorillard of bulk filter material as a component part of a product, and 2) the end product (Kent cigarettes) entered the forum state solely as the result of the actions of Lorillard?

RULE 29.1 LIST

Hollingsworth & Vose Company's non-wholly owned subsidiary corporations are Neponset River Company and Hovomex, S.A. Hollingsworth & Vose Company does not have a parent corporation.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Respondent, Hollingsworth & Vose Company ("H&V"), submits this brief in opposition to the petition for a writ of certiorari filed by Petitioner, Beverly Lesnick ("Lesnick").

STATEMENT OF THE CASE

Lesnick's Statement of the Case does not fairly set forth the case and the facts. H&V, therefore, submits the following statement of the relevant facts.

H&V is a corporation organized and existing under the laws of the Commonwealth of Massachusetts with its principal place of business in East Walpole, Massachusetts. Beginning in March 1952, H&V Specialties Co., Inc., a then-existing subsidiary of H&V ("Specialities"), manufactured an asbestos-containing filter media which was sold in bulk form to P. Lorillard Company, Inc. ("Lorillard"). The filter media was used by Lorillard in the manufacture of filters for its Kent cigarettes. Specialties manufactured the filter media in Massachusetts and shipped it to Lorillard's factories in Louisville, Kentucky and Jersey City, New Jersey. These were the only two locations to which the filter media was ever delivered. Specialties ceased production of the filter media in May 1956. Specialties was merged into H&V in 1957.

Specialties manufactured the filter media pursuant to a contract with Lorillard entered into on February 14, 1952 (the "Agreement"). The Agreement provided that, for a period of five years, Specialities would manufacture and sell filter media to Lorillard. Once the material was shipped to Lorillard, Specialties had no control over the re-use of the material or the ultimate manufacture, marketing, or sale of Lorillard's product.[1]

SUMMARY OF ARGUMENT

In her petition, Lesnick is seeking the adoption of two rules of law, each of which would fundamentally alter fifty years of

[1] The court of appeals refers to H&V and Specialities collectively as H&V throughout its opinion. Respondent, therefore, has done likewise in the body of this opposition.

"minimum contacts" due process analysis. First Lesnick argues, as she did in the courts below, that the contacts of Lorillard with Maryland, in marketing its cigarettes in that state, should be imputed to H&V for jurisdictional purposes. To accomplish this Lesnick seems to claim that Lorillard was in some sense H&V's agent (while nonetheless having agreed in the district court that there was no basis for a claim there was a joint venture between H&V and Lorillard). Lesnick seeks to assert jurisdiction over H&V through the marketing activities of a wholly unrelated entity, thereby ignoring the longstanding notion that the existence of personal jurisdiction depends upon the nature and quality of the relationship between the *defendant* itself, the forum and the litigation.

Second, Lesnick advances the notion that a plaintiff should always have the right to "fully vindicate his rights in the forum of his residence." Pet. 10.[2] Lesnick faults the court below for failing to apply this supposed rule. Again Lesnick has shifted the focus entirely away from the defendant's contacts with the forum state, to a generalized notion of fairness to, and convenience of, the plaintiff. Here too, Lesnick urges the Court to abandon the "minimum contacts" analysis first established in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).

Lesnick's contention that the decision of the United States Court of Appeals for the Fourth Circuit is in conflict with prior decisions of the United States Courts of Appeals for the Sixth and Eleventh Circuits is in error. The cases upon which Lesnick relies held that where a foreign corporation establishes and controls a distribution network in the forum state it has met the minimum contacts test. Nothing in those cases would allow the assertion of jurisdiction over H&V here. Again Lesnick seeks to merge H&V and Lorillard — somehow granting to H&V the ability to control Lorillard's distribution of its cigarettes.

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[2] The abbreviation "Pet." shall refer herein to the Petition for Writ of Certiorari. Likewise, the abbreviation "Pet. App." shall refer to the Appendix to the Petition for Writ of Certiorari.

The Fourth Circuit properly applied the standard fashioned by this Court for determining whether a state's exercise of jurisdiction over a non-resident defendant comports with due process. The Kent cigarettes that Lesnick alleges caused harm were sold by Lorillard in Maryland. H&V had no contacts with Maryland and engaged in no additional conduct purposefully directed toward the State of Maryland.

REASONS FOR DENYING THE WRIT

I. Petitioner's Contention That The Fourth Circuit's Opinion Is In Conflict With Prior Decisions Of The Sixth Or Eleventh Circuits Is Incorrect.

According to Lesnick, the Fourth Circuit's decision conflicts with prior decisions of the Sixth and Eleventh Circuits. Pet. 6. In fact, neither *Tobin* v. *Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (6th Cir. 1993), nor *Vermeulen* v. *Renault, U.S.A., Inc.*, 985 F.2d 1534 (11th Cir. 1993), the cases relied upon by Lesnick, conflict with the opinion rendered by the Fourth Circuit. In both cases, the defendant had distinct contacts with the forum state, in particular, controlling the means of distribution of its product in that forum. *Tobin* v. *Astra Pharmaceutical Products, Inc.*, 993 F.2d at 544; *Vermeulen* v. *Renault, U.S.A., Inc.*, 985 F.2d at 1550. H&V did not in any sense control the means of distribution of Lorillard's product. Indeed, for these cases to be analogous to the case at bar, Lorillard, a cigarette manufacturer, has to be viewed as a distribution network for H&V's filter material.[3] This notion is obviously absurd and no conflict exists with these cases.

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[3] Indeed, H&V did not manufacture "filters" but the bulk filter material from which Lorillard manufactured filters. Pet. App. 20a.

In *Tobin* v. *Astra Pharmaceutical Products, Inc.*, the plaintiff asserted jurisdiction over a foreign drug manufacturer named Duphar, in the federal district court of Kentucky. 993 F.2d at 542. The Sixth Circuit Court of Appeals found that Duphar had, through its own actions, purposefully availed itself of the privilege of doing business in Kentucky. *Id.*

The court relied on the following contacts between the defendant and Kentucky. First, Duphar, after modifying its product to conform to FDA standards, specifically licensed a distributor, acting as its sales agent, to market the product in all fifty states. *Id.* at 544. Duphar, therefore, controlled "the distribution system that brought [its product] to Kentucky." *Id.* The court further noted that Duphar also kept control over an essential element of the product, i.e. the package insert, by controlling the information given to the FDA as well as controlling any changes in the wording of the product's package insert. *Id.*

By focusing on the control Duphar exercised over the destination and distribution of its product, the Sixth Circuit properly found personal jurisdiction over Duphar in the forum state. This analysis does not conflict with the decision of the Fourth Circuit. Both courts held that before personal jurisdiction is proper over a defendant, there must be evidence that the defendant itself has engaged in conduct directed toward the forum state sufficient to satisfy the "minimum contacts" test of the due process clause. Duphar, as the product manufacturer, "made a *deliberate decision* to market [its product] in all 50 states, including Kentucky, the forum state." *Id.* at 543 (emphasis in original). H&V, on the other hand, had no control, either directly or indirectly, over where Lorillard's products would be sold. As both the district and circuit courts recognized, Lorillard, and only Lorillard, maintained control over the destination, distribution and sale of the final product. H&V, unlike Duphar, did not control the manner of distribution of the end product and there is no conflict between these decisions.

Lesnick also asserts that the Fourth Circuit's opinion conflicts with *Vermeulen* v. *Renault, U.S.A., Inc.*, 985 F.2d 1534 (11th Cir. 1993). In *Vermeulen*, the plaintiff sought personal jurisdiction over the defendant, Renault, in federal district court in Georgia. 985 F.2d at 1541. As Renault was a corporation wholly owned by the French government, the Eleventh Circuit, raised, *sua sponte*, the issue of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA"). *Id.* at 1542-43.

The FSIA mandates that to establish subject matter jurisdiction over a foreign state, that state must have engaged in some commercial activity that "caused a direct effect on the United States." 28 U.S.C. § 1605(a)(2). To determine whether Renault's commercial activities had a direct effect on the United States, the court looked to the minimum contacts test. *Vermeulen* v. *Renault*, 985 F.2d at 1545. Because under the FSIA the forum with which the defendant must have minimum contacts is the United States, the court did not need to find that Renault had any particular contact with Georgia, the forum state, but simply assessed its contacts with the United States as a whole. *Id.*

The court found sufficient contact between Renault and the United States to support federal *subject matter* jurisdiction under the FSIA. *Id.* at 1549. Renault designed its product for the American market; advertised and marketed its product in the United States; established channels for providing regular advice to customers in the United States; and, most importantly, created and controlled the distribution network that brought its product into the United States. *Id* at 1549-50.[4]

Renault's contacts with the United States had all of the indicia of purposeful availment of the privilege of conducting business

[4] *Vermeulen* is a case principally concerned with subject matter jurisdiction under the FSIA. 985 F.2d at 1553. The "minimum contacts" analysis arises in that context only and does not relate to whether the assertion of jurisdiction by a state court is consistent with due process.

in the United States by designing, marketing and advertising its product for and in the United States; establishing channels for advising customers in the United States; and creating and controlling the distribution network that brought its product into the United States. *Vermeulen* v. *Renault*, 985 F.2d at 1550. The nature, extent and quality of Renault's contacts with the United States — and in particular its control of the distribution network for its automobiles — render the case wholly distinguishable. H&V did not control the distribution of Lorillard's product, and these decisions are not in conflict.[5]

II. The Fourth Circuit Correctly Applied The Standard Governing The Exercise Of Personal Jurisdiction Under The Due Process Clause.

In determining that a Maryland court could not properly exercise personal jurisdiction over H&V, the Fourth Circuit applied the prevailing constitutional analysis. The Fourth Circuit carefully traced the historical development of the standard for long-arm jurisdiction as articulated by this Court and closely examined the implications of this Court's most recent opinions in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980) and *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102 (1987).

[5] Initially in the district court, Lesnick claimed — withouth an evidentiary basis — that H&V and Lorillard were involved in a joint venture. The district court observed that this contention was "close to frivolity" and gave Lesnick the opportunity for further briefing. Respondent App. 3. Lesnick then expressly waived the notion that H&V and Lorillard were joint venturers and hence each other's agents for jurisdictional purposes. Pet. App. 15a. In the court of appeals, however, Lesnick attempted to re-raise the notion, calling it a "co-partnership" (a contention referred to as *de facto* agency). Pet. App. 15a. In any event, this contention amounts to an assertion that the jurisdictional analysis should be governed by Lorillard's and not H&V's contacts with Maryland. A contention properly rejected by both the district court and the court of appeals.

Although the standard for the exercise of personal jurisdiction pursuant to the due process clause has undergone progressive refinement since the time of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum state." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474 (1985). Satisfaction of the "minimum contacts" test requires "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state." *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958).

This Court has explained that jurisdiction is proper only where "the contacts result from actions by the defendant *himself* that create a 'substantial connection' to the forum state." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. at 475 (citing *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (emphasis in original)). As this Court has observed, the "unilateral activity of those who claim some relationship with the defendant cannot satisfy the requirement of contact with the forum state." *Hanson* v. *Denckla*, 357 U.S. at 253 (quoted in *Burger King*, 471 U.S. at 474-75). Hence, Lorillard's contacts with Maryland cannot properly prove to be the basis for establishing jurisdiction over H&V.

Lesnick seeks to avoid the application of this principle by implicitly raising the notion that Lorillard was somehow H&V's agent for selling filter material (and hence for establishing jurisdiction) in Maryland. Lesnick, for instance, speaks of "joint efforts" of H&V and Lorillard to bring Kent cigarettes to Maryland. Pet. 5. As both the district court found and the court of appeals upheld — taking all facts as alleged in the complaint as true — there is no factual basis to establish an agency or joint venture relationship. Pet. 15a. The fact remains that it is H&V's contacts with Maryland which must be viewed when determining if jurisdiction is proper, and H&V directed no conduct to Maryland.

In challenging the validity of the Fourth Circuit's decision, Lesnick also contends that the court found that H&V engaged in "additional conduct" beyond merely placing its filter media in the stream of commerce, but still found no personal jurisdiction over H&V. *Id.* Lesnick suggests, therefore, the Fourth Circuit misapplied the "additional conduct" test set forth in Justice O'Connor's plurality opinion in *Asahi*. Pet. 8. Here Lesnick is engaging in a semantic game. Justice O'Connor's *Asahi* opinion would require "an action of the defendant purposefully *directed* toward the forum state." *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. at 112 (emphasis added). The Fourth Circuit applied precisely that standard, finding H&V directed no additional conduct *toward Maryland*. Pet. App. 15a. Lesnick's generalized contentions that H&V designed "the product for national distribution" or that "Lesnick purchased cigarettes in Maryland as a result of H&V's joint efforts with Lorillard" make clear that the Fourth Circuit's conclusion was correct. Pet. 8. Again, only by imputing Lorillard's national distribution of its cigarettes to H&V and calling it a "joint" effort can any contacts with Maryland be claimed.[6]

In the court below Lesnick had argued that jurisdiction over H&V should exist since H&V had delivered its filter media into the stream of commerce with the expectation that Kent cigarettes using it would be purchased in the forum state. Pet. App. 14a. The Fourth Circuit noted, however, that the so-called "stream of commerce" rule is not as broad as Lesnick claimed. *Id.* Lesnick was seeking adoption of the rule that any time a party delivers a product into a stream of commerce, it must be foreseeable it will reach a forum state, thereby creating jurisdiction.

[6] This is Lesnick's characterization of H&V's activity. It is not the characterization made by either the district court or the circuit court, nor is it an accurate statement supported by anything in the record.

In fact, as this Court stated in *World-Wide Volkswagen*, by itself, mere "foreseeability" that the product would reach the forum state is not sufficient to establish jurisdiction over the seller. 444 U.S. at 295. As the Court noted, if mere foreseeability is the test, then a seller "appoints the chattel as his agent for service of process." *Id* at 296. The Fourth Circuit rejected Lesnick's contention that jurisdiction existed because it was foreseeable that H&V's filter media — once manufactured into cigarette filters by Lorillard — would be sold in Maryland by Lorillard. Pet. App. 15a. Indeed, only under the view expressed in the dissenting opinion in *World-Wide Volkswagen* (that given the inevitability of the stream of commerce reaching distinct locales foreseeability is enough to establish jurisdiction) can jurisdiction exist over H&V here.

Lesnick is, in effect, asking this Court to reverse *World-Wide Volkswagen* and its progeny and adopt the mere foreseeability test of the *World-Wide Volkswagen* dissent. That the Fourth Circuit declined to adopt this view, and instead applied existing law, provides no basis for a grant of certiorari.

Lesnick is arguing for adoption of a rule that would allow the assertion of personal jurisdiction over the supplier of a component of a product anywhere the final product is sold. The basis for creating this nationwide jurisdiction, according to Lesnick, is "reason and justice" and the convenience of plaintiffs in bringing their product liability claims in the jurisdiction in which they reside. Pet. 10. Only by abandoning the notion of a limit placed by the due process clause upon the jurisdictional reach of state courts can Lesnick's desired outcome of plaintiffs' always being able to sue in the jurisdiction of their residence be attained. As Lesnick puts it "plaintiffs will not be able to bring claims in the forum of their residence." Pet. 10. This, however, is an inevitable result, as long as there is a due process analysis that places any limits whatsoever upon the jurisdictional reach of state courts. If the due process clause limits state courts some of the time from

asserting jurisdiction over some defendants, then at least some plaintiffs will not be able to bring claims in the forum of their residence. Only by abandoning the minimum contacts analysis, and reversing the holding of *International Shoe*, can Lesnick's result be attained.

The rule sought by Lesnick is contrary to established law in two respects. First, it would allow jurisdiction over suppliers of component parts — always and in all instances — merely because of their status as component suppliers without regard to their actual contacts with the forum state. Second, Lesnick's nationwide jurisdiction is based upon "fairness" to a plaintiff and not upon the question of due process and fairness to the defendant. Lesnick asks for a broad expansion of personal jurisdiction effectively reversing *World-Wide Volkswagen* and its progeny, and indeed abandoning entirely the "minimum contacts" logic of *International Shoe*.

The Fourth Circuit's decision is a straightforward application of the rules in *International Shoe*, *World-Wide Volkswagen* and the plurality opinion in *Asahi*, as applied to the facts of this case, and the application for a writ of certiorari ought to be denied.

CONCLUSION

For the foregoing reasons, Respondent, Hollingsworth & Vose Company, respectfully requests that this Court deny Lesnick's petition for a writ of certiorari.

Respectfully submitted,

HOLLINGSWORTH & VOSE COMPANY

By its attorneys,

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January 18, 1995

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Transcript of In-Chambers Conference Before the Honorable Frank A. Kaufman, United States District Court Judge App. 1

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BEVERLY LESNICK, Personal Representative of the Estate of Stanley S. Lesnick, Plaintiff,	*	Civil Action No. K-91-3
v.	*	
LORILLARD, INC. and HOLLINGSWORTH & VOSE, Defendants.	*	101 W. Lombard Street Baltimore, MD 21201 January 5, 1993

TRANSCRIPT OF IN-CHAMBERS CONFERENCE BEFORE THE HONORABLE FRANK A. KAUFMAN UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff: HOWELL K. ROSENBERG, ESQUIRE
MARC SELDIN ROSEN, ESQUIRE

For Lorillard, Inc.: JAMES E. GRAY, ESQUIRE
WILLIAM S. OHLEMEYER, ESQUIRE

For Hollingsworth & Vose: ANDREW J. McELANEY, JR., ESQ.
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S. ELIZABETH EVANS, ESQUIRE

Transcription Service: MONIQUE E. GIBSON
M.E.G. TYPING & TRANSCRIPTION

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

MR. MCELANEY: Your Honor, I do not think the factual record would support a finding that the Hollingsworth and Vose or Specialties or Lorillard were indeed a joint venture with respect to the manufacturing --

THE COURT: I never said they were. I said that plaintiff took the position that it was a joint venture. I don't think I said that I accepted that it was a joint venture, but if I did, I would tell you that don't think I need reach the question. But perhaps now that I think of it, I do. If it were a joint venture and a real joint venture, then you might have an agency. I don't think you had a joint venture for purposes of marketing. If that were so, for example, and I would ask plaintiff's counsel this question, if it were a joint venture, wouldn't an injured worker -- well, let's stay away from worker because we get into worker's compensation. Wouldn't a visitor to the Louisville plant of Lorillard or a visitor to the New Jersey plant of Lorillard who was injured due to negligence of a Lorillard employee be able to sue Hollingsworth as well as Lorillard on the basis that it was joint venture and that they were conducting an entire joint venture from start to finish? Who wants to answer that on plaintiff's side?

MR. ROSEN: You're asking if it's a personal injury on the plaintiff?

THE COURT: Yes, sure. If it's a joint venture between Hollingsworth and Lorillard, a visitor comes into the plant in New Jersey or in Kentucky, would the visitor be able to sue both on the grounds that everything that went on, from the start of the making of the filter up in Massachusetts, right through to the sale of the Kent cigarettes was a joint venture?

MR. ROSEN: Marc Rosen, and I would answer the question yes.

THE COURT: Well, it seems to me your answer speaks for itself in terms of the untenability of the position. All right. I think you're raising the joint venture point, the way you've raised it, Mr. McElaney, is healthy, and you've raised it more clearly, it seems to me, than it's raised in the memoranda. In the memoranda, the point and question was raised, of course, of agency which, in a sense, is the same thing that's raised in the question of the joint venture point. But the way we've come at it today, bringing this point clearly into focus, I'll hear from the plaintiff. Tell me about this joint venture. Well, I don't want to waste time. Just put that down as an item to be briefed too. And let's have some law on it, instead of jury speeches on what constitutes a joint venture.

And I would say this to plaintiff's counsel, I think you're getting close to frivolity in terms of the pushing of some of these positions. Please understand what I'm saying. I don't think this assertion of personal jurisdiction is frivolous. Anytime you have a court that's divided as the Supreme Court was in Ashi,[sic] and anytime you have views as those are stated as strongly as some of the justices stated in Ashi [sic] and in the preceding cases, the preceding Supreme Court cases, I don't think that good counsel could possibly do anything other than plaintiffs have done. But I think when you start to try to fit yourself into certain (inaudible) over precedent, and I don't think you can possibly have of what occurred here into a joint venture. And I think my example to you points that out. I just don't believe that where you have cooperation of the kind that you have here and the associations that we have here that the two companies that are involved in that association take on all the colorations of the other. Just as I find it hard to believe that that visitor to the Lorillard plant in Kentucky or the New Jersey plant of Lorillard could be sued if a visitor to the Hollingsworth plant in Massachusetts was injured and turned around and sued Lorillard as well as Hollingsworth.

There were certain things that were done in this case that were clearly the province of Lorillard and clearly the province, on the other hand, of Hollingsworth. Hollingsworth decided how to run its plant and designed the structure. Lorillard decided how to run its plant. Does the defendant Hollingsworth take any different position?

MR. MCELANEY: Andrew McElaney. No, Your Honor.

THE COURT: Does Lorillard counsel want to be heard on this? Do you take any different position?

MR. OHLEMEYER: No, sir, Your Honor. William S. Ohlemeyer.

THE COURT: All right. If you want to brief this, you can. You're pressing this joint venture issue. I have to say, with all due candor to plaintiffs, that what's come out of this healthy discussion Mr. McElaney engendered is that to be very honest, gentlemen, you made a jury speech to me, and I didn't realize it. Your memoranda on joint venture just goes on as if you were talking to a jury. But you've got to analyze case law and governing case law, whatever that is under choice of law to show that there was a joint venture, because a joint venture means, I think, just was Mr. Rosen's candid answer to this Court's question, what's that? What else, Mr. McElaney?

MR. MCELANEY: Your Honor, I don't have anything further.